IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 105 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE STATE OF GUJARAT - Applicant(s)
Versus
ZALA (THAKOR) KANUBHAI KANTUJI - Respondent(s)

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Appearance :

MS.HANSA PUNANI, ADDL. PUBLIC PROSECUTOR for Applicant(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 14/03/2007

ORAL JUDGMENT

The State of Gujarat is before this Court being aggrieved by order dated 04.01.2007 passed below application, Exhibit 1 in Sessions Case No.87 of 2006

by the learned Sessions Judge, Patan, whereby the learned Sessions Judge was pleased to dismiss the application, exh.1 dated 09.11.2006 filed under sec.307 of the Code of Criminal Procedure (hereinafter referred to as “the Code”) praying that he be tendered an pardon.

Rule. Mr.Naik, learned advocate appearing for the respondent waives service of rule.

The respondent has also approached this Court by filing Criminal Revision Application No.27 of 2007 challenging the very same order wherein this Court issued rule on 25.01.2007 returnable on 28.02.2007.

When the matter came up for consideration the learned APP prayed for time on the ground that he has received instructions to challenge the order impugned. The matter was adjourned from time to time. The State has filed the present Criminal Revision Application.

Brief facts of the case are set out in para 2 in the

Revision Application (Criminal Revision Application No.105 of 2007). Para 2 is reproduced for ready perusal:

> “The applicant submits that the brief facts of the case that FIR being I-CR-14 of 2006 under section 302, 404, 201, 120 of Indian Penal Code was registered against respondent and other accused persons. The case was committed to the Sessions Court, which was registered as Sessions Case No.66/06. However, the present accused Kanubha Kantuji surrendered on 9/10/2006 and supplementary charge sheet was submitted and thereafter, it was committed to the Sessions Case Court, which was registered as Sessions Case No.87 of 2006 in Session case No.66 of 2006 charge was framed against the accused persons and 21 witnesses were examined. Sessions No.66 of 2006 was for waiting for further evidence. The respondent accused Kanubha Kantuji Zala submitted an application under section 307 of Cr.PC at

Exh.1 by speed post in session case no.87 of 2006, prior to framing of charge.

In Sessions Case NO.66/06 and Session Case No.87/06 the accusation against accused persons were that they have hatched criminal conspiracy for committing murder of Dhaval Bharatbhai Modi and putting the criminal conspiracy in action by inflicting knife injuries on several part of body of Dhaval Bharatbhai Modi and Dhaval Bharatbhai succumbed to the injuries on 16/1/2006. There was an accusation against all these accused that with a view to screening the evidence dead body of Dhaval was removed from scene of incident to other place and it was thrown near bank of river passing near Vadavali Village of Chanasma Talati and after throwing dead body of Dhaval near bank, the petrol was sprinkled on it and it was put on fire. And thereafter they have removed belonging of this Dhaval including his gold ring, etc. and the motor cycle of

deceased Dhaval was also taken away. In commission of above said offence other vehicle, i.e. Motor Cycle and auto rickshaw were utilised and now in this Sessions Case No.87/06, the accused Kanubha Kanuji Zala has submitted an application under section 307 of Cr.PC, which has been sent from Sub-Jail, Patan as stated herein before."

The learned APP submitted that the learned Sessions Judge has committed an error in dismissing the application without appreciating the true scope of section 307 of the Code. Section 307 of Code reads as under:

"**Power to direct tender of pardon.** - At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such

offence, tender a pardon on the same condition to such person."

The learned APP submitted that the learned Judge confused with the provision of sec.306 of Code. Section 306 of Code provides for tender of pardon to accomplice. Subsec.(1) of sec.306 of the Code reads as under:

"(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magi at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or

abettor, in the commission thereof.”

The learned APP submitted that the confusion in the mind of the learned Sessions Judge is reflected from the following observations made by the learned Judge in para 5 of the judgment,

> “The arguments canvassed by the Ld. Special Prosecutor Mr.S.M. Modi on the point of recording of statement are too attractive but difficult to swallow up because in latter part of section 306 of Cr.PC it has been specifically mentioned that tender of pardon accomplice co-accused can be given on condition of his making a full and true disclosure of the whole of the circumstance with his knowledge relating to the offence and toe very other person whether as principal or abettor in the commission thereof. If we read these both section 306 and 307 one after another it emerges that impliedly a condition mentioned a later part

of section 306 of Cr.PC is therein Section 307 of Cr.PC also.”

After recording the submissions of the learned APP, and the learned advocate for the respondent the learned Sessions Judge was pleased to observe as under in para 8:

> “In view of arguments canvassed by the Ld.Prosecutor Mr.Modi as well as Ld. Advocate Mr.M.L. Chaudhari, the accused himself is not ready and willing to get his any sort of statement recorded and prosecution itself is not willing or ready to get the disclosure statement of the accused or confessional statement u/sec.164 of Cr.PC recorded, the accused cannot be tendered pardon.”

The learned APP submitted that in fact the decision of the Hon'ble the Apex Court clearly deals with this very aspect and it was cited before the learned Sessions Judge, being in the matter of

Narayan Chetanram Chaudhary and another Vs. State of Maharashtra, reported in (2000) 8 Supreme Court Cases 457. The learned APP invited attention of the Court to the observations made by the Hon'ble the Supreme Court in para 25. For ready perusal, the same is reproduced hereinbelow:

> “In order to appreciate the submissions of the learned Counsel a reference to Sections 306 and 307, Cr.P.C. is necessary. Section 306 provides:
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> "Tender of pardon to accomplice (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or, inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2)This section applies to :

(a) any offence triable exclusively by the Court of Session or by the Court of a special Judge appointed under the Criminal Law Amendment Act, 1952;

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made;

and shall, on application made by the accused, furnished him with a copy of such record free of cost.

(4)Every person accepting a tender of pardon made under sub-section (1)-

(5)

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,-

(a) commit it for trial-

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of special Judge appointed under the Criminal Law Amendment Act, 1952, if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself."

Section 307 provides :

"Power to direct tender of pardon.- At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or

indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

A perusal of both the Sections clearly indicates that Section 306 is applicable in a case where the order of commitment has not been passed and Section 307 would be applicable after commitment of the case but before the judgment is pronounced. The provisions of sub-section (4)(a) of Section 306 would be attracted only at a stage when the case is not committed to the Court of Session. After the commitment, the pardon is to be granted by the trial Court subject to the conditions specified in sub-section (1) of Section 306, i.e. approver making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. It may be noticed that under the old Code, only the District Magistrate had the power to tender pardon, at any stage of the investigation, inquiry or trial even though he himself might not be holding such inquiry or trial. Pardon could be granted by the District Magistrate even during the pendency of the trial in the Sessions Court. By Criminal Law Amendment Act, 1952, old Sections 337 to 339 were substituted by Sections 306 to 308 of the Code of Criminal Procedure conferring the

> power to tender pardon only to Judicial Magistrates and the trial Court. Section 307-in its present from- does not contemplate the recording of the statement of the approver twice as argued. Accepting the submissions made on behalf of the appellant would amount to legislate something in Section 307 which the legislature appears to have intentionally omitted."

The learned APP submitted that the Hon'ble the Apex Court has clearly observed that sec.306 is applicable in case where order of commitment has not been passed and sec.307 would be applicable after commitment of the case, but before the judgement is pronounced.

The learned APP submitted that despite this clear position of law, the learned Sessions Judge has dismissed the application which is going to cause serious prejudice to the prosecution. The learned APP submitted that the learned Sessions Judge lost sight of the object of putting sections 306 and 307 of the Code on the Statute Book and erred in rejecting and dismissing the application, which resulted into frustrating the object of placing

sec.307 of the Code on the Statute Book; Therefore, this Criminal Revision Application is required to be allowed and the judgement and order of the learned Sessions Judge is required to be quashed and set aside so as to see that interest of the prosecution is protected and there is no miscarriage of justice.

The learned APP also relied upon the decision of the Hon'ble the Apex Court in the matter of **Jasbir Singh Vs. Vipin Kumar Jaggi and others**, reported in A.I.R. 2001 Supreme Court 2734. The learned APP invited attention of the Court to the observations made by the Hon'ble the Apex Court in paras 14, 18 and 19, which are reproduced hereunder for ready perusal:

> “14. The grant of pardon by Court is rooted in the premise that most criminals try to avoid detention. Crimes like smuggling, by definition are carried on secretively. The persons involved in such criminal activity would obviously try to conceal and hide any evidence of their activities in as many ways as human ingenuity can devise. That is why the prosecution is often compelled to rely on the evidence of an accomplice to bring the most serious offenders to book. Besides ". .... to keep the sword hanging

over the head of an accomplice and to examine him as a witness is to encourage perjury". Laxmipat Choraria v. State of Maharashtra, AIR 1968 SC 938: (1968 Cri LJ 1124).”

“18. Although the power to actually grant the pardon is vested in the Court, obviously the Court can have no interest whatsoever in the outcome nor can it decide for the prosecution whether particular evidence is required or not to ensure the conviction of the accused. That is the prosecution's job. This was the view expressed in Lt. Commander Pascal Fernandes v. State of Maharashtra, AIR 1968 SC 594 at p. 599 : (1968 Cri LJ 550), where it was said :

". . . . . Ordinarily it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judges he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency, and must, therefore, be exercised only when the prosecution joins in the request. The State may not desire that any accused be tendered pardon because it does not need approver's testimony. It

may also not like the tender of pardon to the particular accused because he may be the brain behind the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will undubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case." (Emphasis supplied)

“19. Judged by this standard, the first order of the Sessions Judge refusing pardon to the respondent No. 1 even though it was actively canvassed for by the Special Public Prosecutor, was wrong. It was not for the Sessions Judge to have considered the possible weight of the approvers evidence, even before it was given. In any case, the evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. But the suspicion may be removed and if the evidence of an approver is found to be trustworthy and acceptable then that evidence might well be decisive in securing

> a conviction (see Suresh Chandra Bahri v. State of Bihar (1994 AIR SCW 3420 : AIR 1994 SC 2420 : 1994 Cri LJ 3271) (supra).The Sessions Judge could not and indeed should not have assessed the probable value of the possible evidence of the respondent No. 1 in anticipation and wholly in the abstract.”

The learned APP submitted that the Hon'ble the Apex Court has held in terms that, 'it is for the prosecution-prosecutor to decide as to whether the request be made to ask that a particular accused out of several may be tendered pardon and be examined as an approver'. The learned APP strenuously submitted that the Hon'ble the Apex Court emphatically said that, “It is not for the Special Judge to enter the ring as a veritable director of prosecution”. The learned APP submitted that in that view of the matter the decision of the learned Sessions Judge is erroneous and to avoid miscarriage of justice it is required to be quashed and set aside by this Court.

The fact that the respondent has also filed a revision application and the same is already admitted by this Court, the submissions made by the learned APP are not opposed, rather supported by the learned

advocate appearing for the respondent.

In view of the aforesaid decisions of the Hon'ble the Apex Court and in view of the trite law on the subject, this Criminal Revision Application is allowed. Rule is made absolute. The judgement and order is quashed and set aside. The matter is remanded to the learned Sessions Judge for its consideration in light of the observations made hereinabove, particularly the aforesaid two decisions of the Hon'ble the Apex Court.

Taking into consideration the time consumed before this Court during the ongoing trial, it is deemed fit to direct that the learned Judge shall give due priority to the matter and decide the same as expeditiously as possible, preferably by 15.04.2007. It is directed that until the application is decided afresh as directed hereinabove trial is not to be proceeded with.

(RAVI R. TRIPATHI, J.)

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